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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In Re Applications of	)	WT Docket No. 97-199
	)	
Westel Samoa, Inc.	)	File No. 00560-CW-L-96
	)	
For Broadband Block C Personal	)	
Communications Systems Facilities	)	
	)	
and	)	
	)	
Westel, L.P.	)	File Nos. 00129-CW-L-97
	)	00862-CW-L-97
For Broadband Block F Personal	)	00863-CW-L-97
Communications Systems Facilities	)	00864-CW-L-97
	)	00865-CW-L-97
	)	00865-CW-L-97
and	)	
	)	
Anthony T. Easton	)	
	)	

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S  
OPPOSITION TO PETITION FOR RECONSIDERATION**

On October 6, 1997, Anthony T. Easton petitioned the Commission for reconsideration of its action ordering him to show cause why he should not be barred from holding any Commission license or participating in any future Commission auctions. The Chief, Wireless Telecommunications Bureau (Bureau) hereby files an Opposition to Mr. Easton's Petition.<sup>1</sup>

1. As a preliminary matter, the Bureau notes that during a prehearing conference in this proceeding on October 15, 1997, the Presiding Administrative Law Judge indicated that Mr.

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<sup>1</sup> Although Mr. Easton's pleading does not state to whom it is addressed, the Bureau is directing its Opposition to the Commission because Mr. Easton's Petition for Reconsideration would have been appropriately directed to the Commission.

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*DJG*

Easton had not filed a timely Notice of Appearance. Consequently, the Presiding Judge stated his intention to issue an Order certifying the matter regarding Issue 1 to the Commission.<sup>2</sup> The Bureau believes that, having waived his right to participate in the instant docketed proceeding, Mr. Easton's Petition should be summarily dismissed. Mr. Easton's failure to file a Notice of Appearance in the captioned proceeding is an indication that he does not intend to participate in the case. That is inconsistent with his filing of the subject Petition. Assuming *arguendo* that the Commission considers Mr. Easton's Petition, the Bureau hereby submits the following Opposition.

2. On September 9, 1997, the Commission released a *Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*,<sup>3</sup> which, *inter alia*, ordered Mr. Easton to show cause why he should not be barred from holding any Commission license or to participate in any future Commission auction because of misrepresentations made by Mr. Easton concerning a mistaken bid placed in the Commission's Personal Communications Systems (PCS) broadband C Block auction. Mr. Easton argues that the Commission lacks the authority to order him to appear before it because he is not a licensee or an applicant. Mr. Easton additionally objects to the Commission's conclusion that he misrepresented facts before the Commission and argues that he has not been given the opportunity to present his version of the situation. As discussed in further detail below, Mr. Easton's Petition should be dismissed or denied.

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<sup>2</sup> As of the date of the instant filing, to the Bureau's knowledge, the Presiding Judge has not yet issued the certification Order. Upon the release of the certification Order, the Bureau intends to file responsive comments.

<sup>3</sup> *Westel Samoa, Inc.*, FCC 97-322 (released September 9, 1997) ("Order").

3. Mr. Easton's Petition is procedurally defective and should therefore be dismissed. Section 1.106(a)(1) of the Commission's Rules specifies that "petitions for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding." 47 C.F.R. § 1.106(a)(1). Mr. Easton's petition does not relate to an adverse ruling concerning his participation in the proceeding; to the contrary, the Order to Show Cause specifically made Mr. Easton a party to the proceeding.<sup>4</sup> Furthermore, Section 1.106 of the Rules only allows petitions for reconsideration of *final* Commission rulings and because a Hearing Designation Order or an Order to Show Cause are both interlocutory actions, a petition for reconsideration of such Orders cannot be entertained.<sup>5</sup> Accordingly, Mr. Easton's Petition is premature and should be dismissed.

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<sup>4</sup> See, e.g., *Kennebec Valley Television, Inc.*, 3 FCC Rcd 4524 (1988); *Grayson Enterprises, Inc.*, 69 FCC 2d 1824 (1978); *RCA American Communications, Inc.*, 69 FCC Rcd 426 (1978). The cases cited by Mr. Easton where the Commission has reconsidered a hearing designation order are inapplicable here. In *Seattle Public Schools*, 60 Rad. Reg. 2d (P&F) 1073 (1986), the Commission permitted a petition for reconsideration of a hearing designation order finding that there were questions regarding the applicability of a rule, and therefore the hearing should be deferred pending consideration of that matter. In the instant proceeding, there is no question regarding the applicability of any Commission Rules. In *Storz Broadcasting, Co.*, 51 FCC 2d 575 (1975), the Commission discovered that the situation upon which the hearing was predicated may not have actually occurred, therefore serious questions were raised as to whether a hearing was necessary. Mr. Easton proffers nothing to demonstrate that the misrepresentations upon which his Order to Show Cause is based did not occur. In *John F. Burns*, 41 FCC 2d 851 (1973), an applicant attempted to amend its application but the amendment was rejected in the hearing designation order. The Commission allowed for reconsideration because it believed that the applicant raised substantial questions which could only be answered by the Commission before the hearing. Mr. Easton has advanced no questions which require resolution prior to a hearing.

<sup>5</sup> 47 C.F.R. § 1.106(a)(1). See *James A. Kay, Jr.*, 12 FCC Rcd 2898 (OGC 1997); *American Cablesystems of Florida, LTD*, 10 FCC Rcd 8895 (CCB 1995); *Trinity Broadcasting of Florida, Inc.*, 9 FCC Rcd 2567 (1994); *WWOR-TV, Inc.*, 6 FCC Rcd 4878 (1991); *Black Television Workshop of Los Angeles, Inc.*, 4 FCC Rcd 3871 (1989).

4. Mr. Easton argues that his Petition is allowable because the Order to Show Cause concluded that Mr. Easton committed the misconduct alleged which constitutes an adverse ruling as to him. The Bureau believes, however, that Mr. Easton's Petition must be dismissed as untimely. While Section 1.106(b)(1) of the Rules does allow a "person whose interests are adversely affected by any action taken by the Commission"<sup>6</sup> to file a Petition for Reconsideration, the Order which concluded that Mr. Easton misrepresented facts and lacked candor was the Notice of Apparent Liability for Forfeiture issued against PCS 2000, L.P. (PCS 2000),<sup>7</sup> not the instant Order. If Mr. Easton believed he was aggrieved by the conclusion in the *PCS 2000 NAL* that he misrepresented facts or lacked candor, he could have filed a petition for reconsideration of the *PCS 2000 NAL*. Mr. Easton personally participated in the proceedings that led to the issuance of the *PCS 2000 NAL*. He submitted declarations, submitted a report prepared by his own counsel, and met with the staff. Although petitions for reconsideration of Notices of Apparent Liability for Forfeitures do not ordinarily lie,<sup>8</sup> to the limited extent the *PCS 2000 NAL* concluded that Mr. Easton engaged in misconduct, Section 1.106(b)(1) of the Commission's Rules authorized Mr. Easton to file a petition for reconsideration. In *New York Telephone Co.*, 6 FCC Rcd 3303 (1991), the Commission authorized a party who had informally participated in an

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<sup>6</sup> 47 C.F.R. § 1.106(b)(1).

<sup>7</sup> *PCS 2000, L.P.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 1703 (1997) (*PCS 2000 NAL*). The Commission stated in the *PCS 2000 NAL* that, "[it] determined that Mr. Easton, while an officer and registered bidding agent of PCS 2000, intentionally misrepresented facts to the Commission and otherwise lacked candor in his dealings with the Commission. . . . Mr. Easton compounded this misrepresentation by sending to the Commission forged documents purporting to be original bidding data sheets, deleting and destroying other relevant files, and failing to reveal all of the facts as he knew them in his January 26, 1996, affidavit . . . and [in] his later June 26, 1996, declaration." *Id.* at 1715.

<sup>8</sup> See 47 C.F.R. § 1.80.

enforcement proceeding to file a petition for reconsideration of the decision to terminate the proceeding. Here, if Mr. Easton had wished to challenge the conclusion that he misrepresented facts and lacked candor, he was required to have filed a petition for reconsideration of the *PCS 2000 NAL*. By failing to do so, he waived his right to seek further hearings on the question or to challenge that determination in any way. As PCS 2000 did not oppose the forfeiture and paid it in full, and as Mr. Easton did not file for reconsideration of the *PCS 2000 NAL*'s conclusion that he misrepresented facts,<sup>9</sup> that action is now final. Accordingly, his argument that he is entitled to a hearing or to further due process on the question of whether he misrepresented facts or lacked candor is untimely and must be rejected.

5. Mr. Easton also has failed to provide any substantive basis for the grant of his Petition. The Petition is based on the false premise that Mr. Easton is not an applicant or Commission licensee over whom the Commission has jurisdiction.<sup>10</sup> In fact, Mr. Easton is a Commission licensee. He holds a Technician Plus Class operators license in the Amateur Radio Service and a license for station call sign WA3OYF.<sup>11</sup> Furthermore, Mr. Easton has held that authorization at least for the past 20 years. Thus, the Commission has jurisdiction over Mr. Easton.

6. Moreover, Section 1.2109(d) of the Commission's Rules states that "[b]idders who are found to have violated . . . the Commission's rules in connection with their participation in the

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<sup>9</sup> Section 1.106(b)(1) of the Commission's Rules states that "any party to the proceeding, or *any party whose interests are adversely affected* by any action taken by the Commission . . . may file a petition requesting reconsideration of the action taken." 47 C.F.R. § 1.106(b)(1) (emphasis added). Mr. Easton may have attempted to file a Petition for Reconsideration of the *PCS 2000 NAL* as a party whose interests were adversely affected. But he did not.

<sup>10</sup> Petition at 11, 12.

<sup>11</sup> The Commission may use this opportunity to clarify whether Mr. Easton's amateur operator's license is directly at issue in this proceeding.

competitive bidding process . . . *may be prohibited from participating in future auctions.* 47 C.F.R. § 1.2109(d) (emphasis added). The provision to allow the Commission to initiate a proceeding barring a bidder who engages in misconduct in one auction from participating in future Commission auctions is a necessary enforcement tool to ensure that the auction processes run in an efficient and competitive manner. As the U.S. Court of Appeals for the D.C. Circuit has recognized, the Commission enjoys broad discretion "to both define the public interest and to determine what procedures best assure protection of that interest."<sup>12</sup> The Commission's Rules, therefore, appropriately allow for flexibility in allowing the Commission to initiate proceedings to bar those who violate the Commission's Rules and policies in one auction from participating in any subsequent auctions. Mr. Easton was one of the original authorized bidders for PCS 2000, and was so at the time the misrepresentations were made.<sup>13</sup> The misrepresentations were directly related to the submission of a mistaken bid. Therefore, because Mr. Easton was a bidder who has been found to have misrepresented facts to the Commission regarding a bid placed in the competitive bidding process for broadband C block PCS authorizations, the Commission's Rules permit a proceeding to determine whether Mr. Easton should be prohibited from participating in future Commission auctions.<sup>14</sup>

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<sup>12</sup> *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 413 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 3545 (1984).

<sup>13</sup> See PCS 2000, L.P. FCC Form 175.

<sup>14</sup> See, e.g., *Commercial Realty St. Pete, Inc.*, FCC 95-59 (released February 16, 1995) (James C. Hartley, Teresa Hartley, and Ralph E. Howe ordered to show cause why they should not be banned from participating in future Commission auctions for misconduct committed during the Commission's competitive process for Interactive Video and Data Services authorizations).

7. Accordingly, because Mr. Easton is a Commission licensee and because the Commission's Rules specifically allow for a proceeding for barring a bidder who engages in misconduct during a Commission auction from participating in future auctions, the Commission possesses jurisdiction over Mr. Easton.<sup>15</sup>

8. Mr. Easton asserts that the Commission lacks authority under Section 312 of the Communications Act to bring the instant action against him. In this regard, Mr. Easton argues that the Commission has never specified any rule or regulation that Mr. Easton has violated.<sup>16</sup> Mr. Easton then argues that "no provision of the [Communications] Act expressly prohibits a non-licensee or a non-applicant from misrepresenting facts or displaying a lack of candor before the Commission."<sup>17</sup> This argument is unfounded. As stated above, Mr. Easton is a Commission licensee over whom the Commission has authority. Moreover, the Commission made it clear in the Order that Mr. Easton was found to have misrepresented facts to and lacked candor before the Commission. Certainly, a licensee's ability to deal truthfully with the Commission is a matter the Commission may consider in determining whether the licensee is basically qualified.<sup>18</sup>

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<sup>15</sup> Mr. Easton also argues that the Commission does not have authority to order Mr. Easton to cease and desist from any action. That argument, however, is couched on the premise that a cease and desist order is the only authority the Commission has over Mr. Easton pursuant to Section 312 of the Communications Act of 1934, as amended. But, as shown above, because Mr. Easton is a Commission licensee, and because Section 1.2109 of the Rules allows for such a proceeding, there is no need to discuss cease and desist orders. The Commission has full authority to order Mr. Easton to show cause why he should not be barred from holding any Commission license or from participating in future Commission auctions.

<sup>16</sup> Petition at 15.

<sup>17</sup> Petition at 16.

<sup>18</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209 (1985), *recon. denied*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991) (*Character Policy Statement*); *See, e.g., RKO General*,

9. Mr. Easton also makes the specious argument that an individual cannot be deemed to be unqualified to be a Commission licensee if the misrepresentations were made by an individual in his capacity as an officer (as opposed to the capacity of an individual applicant himself). Under Mr. Easton's theory, a corporate officer could misrepresent to the Commission with impunity, and the Commission would be without authority to scrutinize the individual's qualifications in a subsequent proceeding. The Commission's *Character Policy Statement* never contemplated such a distorted result. In the *Character Policy Statement*, the Commission said:

we find as an initial matter that the same types of misconduct should be considered when corporate applicants are involved as when the applicant is a sole proprietorship or partnership. The same violations of the Communications Act, Commission rules or Commission policies and adjudicated cases of relevant non-FCC misconduct have a bearing on the qualifications of an applicant entity regardless of the form in which it does business.

102 FCC 2d 1217. There is no doubt that applicants and licensees before the Commission can and have been disqualified for misrepresentations and lack of candor before the Commission. Misrepresentation and lack of candor are "serious breaches of trust."<sup>19</sup> The Commission's demand for absolute candor is itself all but absolute.<sup>20</sup>

10. Moreover, the Commission in its *Character Policy Statement* determined "that the relevant character traits with which it is concerned are those of 'truthfulness' and 'reliability.'"<sup>21</sup>

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*Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982) (The Commission must rely heavily on the completeness and accuracy of the submissions made to it).

<sup>19</sup> *Character Policy Statement*, 102 FCC 2d at 1210.

<sup>20</sup> See *Emision de Radio Balmaseda, Inc.*, 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), *recon. denied*, 8 FCC Rcd 4335 (1993).

<sup>21</sup> *Character Policy Statement*, 102 FCC 2d at 1209.



The Commission in its *Character Policy Statement*, which has been used to determine the character qualifications for licenses other than broadcast licenses,<sup>22</sup> declared that "[t]he act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission."<sup>23</sup> Mr. Easton's actions bear directly on his trustworthiness and reliability, and therefore, it is appropriate to examine his actions before the Commission as a bidding agent of PCS 2000 to determine whether he is qualified to continue to be a Commission licensee or to be allowed to participate in any future auctions.

11. Lastly, Mr. Easton complains that he "has been given no opportunity to adjudicate the issue of whether he had acted intentionally or to otherwise challenge the outcome of the Commission's investigation."<sup>24</sup> Again, this assertion is not supported by the facts. In February and June, 1996, Mr. Easton submitted sworn declarations to the Commission which advanced arguments on his behalf. In late 1996, Mr. Easton met with Bureau and Office of the General Counsel staff. In January, 1997, Mr. Easton's counsel submitted a report which attempted to counter the Independent Counsel Report submitted by PCS 2000.<sup>25</sup> Therefore, although Mr.

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<sup>22</sup> See, e.g., *Big Country Communications*, 5 FCC Rcd 6013 (CCB 1990); *Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988); *A.S.D. Answer Service, Inc.*, 1 FCC Rcd 753 (1986), *modified*, 3 FCC Rcd 4213 (1988); *aff'd sub nom. Mobilfone of Northeastern Pennsylvania, Inc. v. FCC*, No. 85-1773 *et al.* (D.C. Cir. Nov. 29, 1989).

<sup>23</sup> *Character Policy Statement*, 102 FCC 2d at 1209.

<sup>24</sup> Petition at 22-23.

<sup>25</sup> In January 1996, PCS 2000 retained independent counsel to investigate the matters into the January 23, 1996, mistaken bid. The report was submitted to the Commission and considered as a part of the record in the Commission's investigation. The report, referred to as the Independent Counsel Report, made certain conclusions that, among other things, Mr. Easton misrepresented facts to the Commission. Mr. Easton's counsel prepared a report to challenge the

Easton, in his Petition, calls for the "opportunity to clear his name,"<sup>26</sup> Mr. Easton has heretofore availed himself of opportunities to make submissions on several occasions.

12. Mr. Easton is additionally incorrect in his assertion that his due process rights have been violated. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process Component of the Equal Protection Clause of the Fifth Amendment."<sup>27</sup> Once an interest has been identified, the party seeking due process protection must show that government action has caused significant, grievous injury to the protected interests.<sup>28</sup> Once the initial showing is made, two elements of due process are required, including adequate notice and an opportunity for hearing appropriate to the nature of the case.<sup>29</sup> Here, Mr. Easton has not suffered any due process violation because no action on the part of the government has deprived him of any protected right. The Commission issued the Order providing Mr. Easton with a full and complete hearing on the matter.

13. Mr. Easton, however, argues that the *PCS 2000 NAL* caused him harm in his business<sup>30</sup> and did not allow him an evidentiary hearing to advance his position. First, as shown

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charges made in the Independent Counsel Report; that report is referred to as the Gutierrez Report and was also considered as a part of the record.

<sup>26</sup> Petition at 6.

<sup>27</sup> *Communications Satellite Corporation*, 3 FCC Rcd 7108, 7111 (1988); see also, *Michael D. Bramble*, 58 FCC 2d 565, 567-70 (1976).

<sup>28</sup> *Communications Satellite Corporation*, *supra*.

<sup>29</sup> *Id.*

<sup>30</sup> The Supreme Court has specifically held that injury to reputation alone is not a "liberty" or "property" interest protected under the Constitution. *Paul v. Davis*, 424 U.S. 693 (1976), *reh.*

above, Mr. Easton did advance his position. Second, an evidentiary hearing prior to the issuance of the *PCS 2000 NAL* was not required. The Commission is only required to designate matters for hearing where a material and substantial question of fact exists.<sup>31</sup> Because the Commission was able to make conclusions based on the record before it, no material and substantial question of fact existed, and hence, no hearing was required.<sup>32</sup>

14. Mr. Easton objects to the Commission reaching conclusions regarding his conduct based on a staff investigation. He argues that the Commission's investigation "does not replace [the need for] a hearing"<sup>33</sup> and that the purpose of an investigation is "simply to ascertain the facts."<sup>34</sup> To take Mr. Easton's argument to its logical conclusion would be to argue that the Commission can never make conclusions based upon its investigations, but instead, it must always conduct evidentiary hearings after compiling a factual record. This cannot be the case. As stated above, the evidentiary hearing is only required when a material and substantial question of fact exists after the conclusion of the investigation. Because no such question of fact existed here, no such hearing was required.

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*denied*, 425 U.S. 985 (1976).

<sup>31</sup> See *Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); 47 U.S.C. § 309(e).

<sup>32</sup> The Commission specifically addressed this point in the *PCS 2000 NAL*, where it stated that "[w]hile issues involving a licensee's character qualifications are generally resolved in the context of a hearing, in this instance, we conclude it is not in dispute that misrepresentations were made and a lack of candor has been demonstrated. As a result, there exists no material and substantial question of fact necessitating a hearing." *PCS 2000 NAL*, 12 FCC Rcd at 1714-15.

<sup>33</sup> Petition at 23.

<sup>34</sup> *Id.*

15. Nevertheless, the Bureau believes that the issue designated against Mr. Easton contemplates that he will be afforded a full and complete opportunity to demonstrate why he should not be barred from holding Commission authorizations. Such an inquiry might include whether he misrepresented facts to or lacked candor before the Commission. To the extent that he believes otherwise, Mr. Easton should avail himself of Section 1.229 of the Rules and seek addition of a misrepresentation/lack of candor issue, rather than filing a Petition for Reconsideration of the Order.<sup>35</sup>

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<sup>35</sup> If the Commission believes that the designated issue could be interpreted to be overly restrictive, it may, on its own motion, clarify the issue to specifically allow for an inquiry into the facts and circumstances surrounding the January 23, 1996, bid placed by PCS 2000 in the Commission's broadband PCS C block auction.

Accordingly, for the foregoing reasons, the Chief, Wireless Telecommunications Bureau respectfully requests that the Petition for Reconsideration filed by Mr. Easton be dismissed or denied.

Respectfully Submitted,

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October 16, 1997

CERTIFICATE OF SERVICE

I, Denisee McCray, so hereby certify that I have on this 16th day of October, 1997, has had copies of the foregoing OPPOSITION TO PETITION FOR RECONSIDERATION hand-delivered to the following:

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